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No. 01-298

Supreme Court, U.S.
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In The

Supreme Court of the United States

PAUL LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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QUESTION PRESENTED

WHETHER THE STATE'S ACTION IN REMOVING A CASE TO FEDERAL COURT, SEEKING A DECISION ON THE MERITS AS TO SOME OF THE CLAIMS WHILE ASSERTING ITS ELEVENTH AMENDMENT IMMUNITY AS TO OTHER CLAIMS, CONSTITUTES A KNOWING AND UNEQUIVOCAL WAIVER OF ITS IMMUNITY.

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STATEMENT OF THE CASE

Petitioner glosses over several critical facts. At the time this case was removed to federal court there were federal claims against the individual defendants that were not barred by the Eleventh Amendment. Respondents removed the case in order to have these claims decided in federal court and moved to dismiss these claims under the doctrine of qualified immunity. The district court did in fact, dismiss these claims and Petitioner did not appeal this decision. Moreover, as to the barred claims, Petitioner minimizes the fact that Respondents expressly reserved their rights under the Eleventh Amendment **at the same time** as they removed the case to federal court. Finally, Petitioner omitted the fact that Respondents consistently maintained the position that the State law claims could be remanded to state court while the district court resolved the federal questions presented for review. A more balanced statement of the case is set out below.

Petitioner filed the instant action in the Superior Court of Cobb County, Georgia, seeking damages against the Board of Regents of the University System of Georgia and two state employees, Teresa Covin and Edwin Rugg, in both their individual and official capacities. Petitioner asserted federal claims under 42 U.S.C. § 1983, as well as claims under state tort law. Petitioner did not seek injunctive relief. Respondents answered in the Superior Court of Cobb County raising several defenses including the Eleventh Amendment to the United States Constitution. On the same day, Respondents removed the case to federal court based upon the federal court's original jurisdiction over the § 1983 claims.

In federal court, the Respondents filed a motion to dismiss all claims, or in the alternative, dismiss the federal claims and remand the barred state claims. In particular the state defendants asserted that: (1) the federal claims against the individual Respondents in their individual capacities are barred by the doctrine of qualified immunity; (2) the federal claims against the Board of Regents and the named Respondents in their official capacities are barred by the Eleventh Amendment; (3) neither of these defendants are considered "persons" under § 1983; and (4) the State law claims against all of the Respondents are barred by the Eleventh Amendment and should be dismissed or remanded back to state court for adjudication.

The district court found that the Respondents in their individual capacities are entitled to qualified immunity and dismissed those claims. As to the Board of Regents and the individual Respondents in their official capacities, the district court held that by removing the case to federal court, the Respondents waived their Eleventh Amendment immunity and are now subject to suit in a federal forum on both the state and federal claims.

The Eleventh Circuit reversed the district court as to the finding of waiver, ruling that the State had not exercised a knowing and unequivocal waiver of its Eleventh Amendment immunity. The Circuit Court further found that the Attorney General for the State of Georgia does not have the authority to waive the State's Eleventh Amendment immunity under the Georgia Constitution. It is from these rulings that Petitioner seeks certiorari.

SUMMARY OF THE ARGUMENT

This case is not suitable for the writ of certiorari for several reasons. First and foremost, Petitioner's characterization of the split in the Circuits is exaggerated. In order to create the appearance of a "profound dissonance in the decisions of the courts of appeal" (Pet. Brief p. 6), Petitioner lumps together a variety of cases that have significantly different facts and Eleventh Amendment issues from the case at bar. Unlike most of the cases cited by Petitioner, the Defendants have not asserted claims for affirmative relief, but seek only dismissal of all claims or alternatively dismissal of some and remand of others. Even if there is a split in the circuits, the only circuit that has decided contrary to the Eleventh is the Tenth Circuit; thus the split is not well developed. Similarly, the narrow opinion of the Court below was necessarily dependent on State law and has limited application. In looking for a conflict, Petitioner has unnecessarily broadened the scope of the decision below.

In addition to the fact that this case does not present a well-developed split in the circuits, it is not suitable for certiorari because the decision of the Eleventh Circuit is consistent with current Supreme Court precedent. Petitioner improperly attempts to reincarnate the principle of constructive waiver which this Court has discarded. Finally, Petitioner has not been harmed by the State's act in removing this case, whereas the State would be in a more vulnerable position had the decision of the district court been upheld. Therefore, this Court should decline certiorari in this case.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER HAS EXAGGERATED THE CONFLICT AMONG THE CIRCUITS.

A. THE MAJORITY OF THE CASES CITED BY PETITIONER ADDRESS DIFFERENT ISSUES FROM THE CASE AT BAR.

Petitioner relies on numerous cases to argue that there is a split in the circuits. The majority of these cases significantly differ from the case at bar because they involve situations where the State voluntarily asserted claims for damages or other relief in federal court, or else the state consented to particular actions or orders of the federal court without reserving its Eleventh Amendment rights.

For example, Petitioner cites several cases where the various circuits have followed this Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947), and determined that the State waived its immunity by filing a proof of claim in a bankruptcy proceeding. *See In re Burke*, 146 F.3d 1313 (11th Cir. 1999); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140 (4th Cir. 1997); *In re Lazar*, 237 F.3d 967 (9th Cir. 2001); *In re Platter*, 140 F.3d 676 (7th Cir. 1998); *In re Fifth Ave. Assocs.*, 963 F.2d 502 (2nd Cir. 1992). The Court of Appeals below properly distinguishes these cases from the case at bar. (Pet. App. 6a-7a).

Similarly, Petitioner also inappropriately relies on several other cases to argue that there is a split in the circuits, because these cases involve situations not present in this case. For example, in one circuit a waiver is

found where the state files a counter-claim.[1] In that situation, unlike the removal situation, the state seeks affirmative relief from the federal court. And, as was correctly noted in this case by the Court of Appeals, "[t]he present case did not find its way into our courts because of a state initiated cause of action, rather Lapides filed suit and the state removed to theoretically take advantage of our superior knowledge of the federal questions involved in the case." (Pet. App. 10a).

Finally, in another line of cases, cited by Petitioner to show waiver by litigation conduct, the State submitted to a consent order or consented to court ordered relief without appealing, or, similarly, waited exceedingly late in the proceedings to assert their immunity.[2] However, this issue of the timeliness of the State's assertion of its immunity is not present in this case. Here, the State raised its Eleventh Amendment immunity in its answer and in its motion to dismiss, both of which were filed on the same day as the notice of removal.

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[1] *Howard Company v. Puerto Rico Aqueduct Sewer Authority*, 744 F.2d 880 (1st Cir. 1984); *Newfield House v. Massachusetts Department of Public Welfare*, 651 F.2d 32 (1st Cir. 1981).

[2] *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999); *See also Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984) (the state submitted to a consent order on issues of State law and raised the Eleventh Amendment for the first time when addressing attorney's fees on appeal); *Hawkins v. Finnel*, 964 F.2d 853 (8th Cir. 1992); *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 12 F.3d 406 (3rd Cir. 1993) (state consented to comply with court ordered relief without appealing).

The only cases cited by Petitioner which establish a conflict with the Eleventh Circuit's decision are those out of the Tenth Circuit Court of Appeals.[3] *McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168 (10th Cir. 2000); *Sutton v. Utah State Sch. For the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999). Yet these cases rely on their own unique precedent and at best establish a one-circuit conflict. *Sutton*, 173 F.3d at 1234, 1235, *citing Gallager v. Continental Ins. Co.*, 502 F.2d 827 (10th Cir. 1974). The State in *Sutton* was arguably on notice that its consent to removal would be deemed by the Tenth Circuit to constitute a consent to suit.[4] The State in the present case properly relied on Eleventh Circuit precedent which did not find waiver by removal and thus would not have been on notice. *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986).

B. THE DECISION OF THE ELEVENTH CIRCUIT IS NECESSARILY BASED UPON THE POWERS GRANTED TO THE ATTORNEY GENERAL UNDER THE LAW OF GEORGIA AND ON ELEVENTH CIRCUIT PRECEDENT.

In this case, the Eleventh Circuit analyzed the Georgia Attorney General's authority to waive the State's immunity by removal. (Pet. App. 6a). In determining that

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[3] Petitioner also correctly states that *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984) and *Estate of Porter ex rel. Nelson v. Illinois*, 36 F.3d 684 (7th Cir. 1994) provide support for the Eleventh Circuit's decision.

[4] This would meet at least one of Justice Kennedy's concerns expressed in *Wisconsin v. Schacht*, 524 U.S. 381, 383 (1998).

Georgia's Attorney General lacked the authority to waive the State's Eleventh Amendment immunity, the court relied on the Georgia Constitution as well as Georgia's statutory and case law. *Id.* The issue of an attorney general's authority to waive should be decided on a state-by-state basis. *Ford Motor Company v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945).[5] *See also Magnolia Venture Capitol v. Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998); *California Mother Infant Program v. California Department of Corrections*, 41 F. Supp. 90 (1999).

Further, there are several qualifications to the possibility of finding a waiver. *Wisconsin v. Schacht*, 524 U.S. 381, 393 (1998) (J. Kennedy concurring). Included within those is an exploration of the law of the state and the authority of the official executing the removal, combined with the knowledge of the state that removal could constitute a waiver. The decision in the case at bar thus has little application outside of Georgia.

C. IN LOOKING FOR A CONFLICT, PETITIONER HAS UNNECESSARILY BROADENED THE SCOPE OF THE DECISION BELOW.

The Petitioner has posed an issue for review that is far broader than the issue decided by the courts below. The Eleventh Circuit issued a narrow ruling that the

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[5] It is doubtful that the type of implied waiver doctrine contemplated in *Ford Motor Co.* remains viable today. However, there is no reason to believe that the portion of the opinion that addresses the attorney general's authority to waive the State's Eleventh Amendment immunity is invalid.

Attorney General for the State of Georgia does not have the authority to waive the State of Georgia's Eleventh Amendment immunity by removing a case to federal court. (Pet. App. 1a-11a).

Petitioner argues that this case could resolve issues that have "bedeviled its Eleventh Amendment jurisprudence for many years." (Pet. Brief p. 6). Petitioner argues that there is confusion in the circuits as to whether a waiver exists when a state files a counterclaim, a proof of claim or defends on the merits of a claim which could be barred by the Eleventh Amendment.[6] Petitioner also propounds that the issues of whether the Eleventh Amendment constitutes personal or subject matter jurisdiction could also be addressed if this Court were to grant certiorari to review this case. These issues go beyond the confines of the Eleventh Circuit's narrow opinion. Petitioner would have this Court make this case a springboard for the resolution of constitutional issues far broader than those considered below. To the extent that this Court desires to visit those issues, Respondents respectfully submit that this is not the appropriate case.

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[6] *See* footnotes 1 and 2; *See also McClendon v. Georgia Department of Community Health*, No. 00-15005 (11th Cir. August 17, 2001).

II. PETITIONER ATTEMPTS TO CARVE OUT A NEW AND UNJUSTIFIED EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY.

A. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Eleventh Circuit opinion is consistent with recent decisions of this Court that waiver of Eleventh Amendment immunity cannot be "implied," but must be "express and unequivocal." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). Yet, in seeking review of this case, Petitioner urges the Court to carve out a new and expansive waiver doctrine that is not justified by precedent or equity. Petitioner's theory of finding waiver in the face of an express invocation by the State of its immunity is akin to the "constructive waiver" doctrine which this Court has already discredited. *Id*. Petitioner is asking that an implied waiver be found, in violation of the clear requirement that a waiver must be express and unequivocal. *Id*.

B. ALLOWING THE STATE TO ASSERT IMMUNITY AFTER REMOVAL IS NOT UNFAIR TO PETITIONER.

Petitioner seeks to justify his expansive theory on the alleged unfairness of allowing the State to assert immunity after removal. (Pet. App. 14). Yet this argument does not bear up under inspection.

First, at the time the case was removed, there were non-barred federal claims to be decided by the federal court, prompting the Respondents to properly ask the

federal court to determine if they were entitled to qualified immunity. Second, Petitioner's claims against the Agency and the individuals in their official capacity would not have been viable even if they remained in state court because they are not "people" within the meaning of 42 U.S.C. § 1983, *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and because federal causes of action cannot be pursued against the State in the State's courts unless allowed by the State's constitution or specific provisions of the federal statute. *Alden v. Maine*, 527 U.S. 706 (1999). Lastly, as to Petitioner's tort claims under State law, the Board's motion was made in the alternative. The Board argued that the district court did not have jurisdiction over the State law claims, so they should either be dismissed or remanded back to the state court for adjudication. Thus, with the exception of having the non-barred federal claims decided by a federal court instead of by a state court, Petitioner was in essentially the same substantive position he would have been had the case not been removed. If the decision of the district court were to stand, however, Respondents would be in a more vulnerable position and this should not be the price of admission into federal court. This being the case, Petitioner's request for an expansion of the waiver doctrine is unjustified.

CONCLUSION

WHEREFORE, based on the foregoing, Respondents pray that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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